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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CHARLES DAVI,

Petitioner,

-against-

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RONALD P. FISCHETTI
1290 Avenue of the Americas
New York, New York 10104
(212) 586-3732

Counsel for Petitioner

ANNE C. FEIGUS
Of Counsel

DICK BAILEY PRINTERS, 290 RICHMOND AVE., S.I., N.Y. 10302
TEL.: (212) 447-5358 — (516) 222-2470 — (914) 682-0848

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QUESTION PRESENTED

Whether the trial court's restriction of the cross-examination of a government witness deprived petitioner of his Sixth Amendment right to confront the witnesses against him and his Fifth Amendment right to due process of law?

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OPINION BELOW

The order of the Court of Appeals, dated March 5th, 1981, appears in the Appendix hereto at p. 1a.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on March 5th, 1981. This petition for a writ of certiorari was filed within sixty days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED IN THE CASE

The Fifth Amendment to the United States Constitution states as follows:

> "AMENDMENT V—Capital Crimes; Double Jeopardy; Self-Incrimination; Due Process; Just Compensation for Property
>
> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Sixth Amendment to the United States Constitution states as follows:

> AMENDMENT VI—Jury Trial for Crimes, and Procedural Rights
>
> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

STATEMENT OF THE CASE

The government's case consisted primarily of evidence establishing two sales of heroin—a one ounce sale on February 9th, 1979, and a four ounce sale on March 8th, 1979—by petitioner Davi to Thomas Bernidakis, a government informant. Bernidakis testified that in the Spring of 1978, he began discussing heroin purchase with petitioner whom he had known since 1973 or 1974.

During the trial, the district court ruled that defense counsel not inquire into the underlying circumstances of informant Bernidakis' arrest in March 1980 for armed robbery and assault with a deadly weapon. Prior to trial, the government informed the court and defense counsel of the arrest and the fact that criminal charges were presently pending against Bernidakis in California. The government moved to preclude examination into the underlying circumstances of the crime, arguing that the only relevant inquiry regarded the existence of government promises to intercede on Bernidakis's behalf with the arresting authorities in California. The court ruled that an assault was not, in its view, relevant to the issue of the witness's credibility and, therefore, agreed with the government that the cross-examination should be limited to the government's promises to Bernidakis.

REASONS FOR GRANTING THE WRIT

THE CORRECTNESS OF THE DECISION BELOW IS OPEN TO SERIOUS QUESTION

It is well-established that the right of confrontation and cross-examination is an essential and fundamental requirement of a fair trial. *Pointer v. Texas,* 380 U.S. 400 (1965); *Berger v. California,* 393 U.S. 314 (1969); *Barber v. Page,* 390 U.S. 719 (1968). At the heart of this constitutional guarantee is the accused's right to compel the witness "to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." *Mattox v. United States,* 156 U.S. 237, 242-43 (1895).

The right of confrontation, however, is meaningless unless defense counsel is afforded the opportunity to conduct cross-examination in a comprehensive, thorough and probing manner. In the instant case, the critical witness against petitioner Davi was a government informant who testified extensively about narcotics transactions with petitioner. The informant's credibility was, therefore, of the utmost importance to a determination of petitioner's guilt or innocence.

The district court precluded defense counsel's cross-examination of the informant with regard to the factual circumstances underlying a criminal charge of armed robbery and assault with a deadly weapon which was pending against him. The court ruled that an assault was not, in its view, relevant to the issue of the witness's credibility and, therefore, agreed with the government that the cross-examination should be limited to the government's promises to the informant.

Petitioner Davi contends that under the circumstances of the case at bar, this ruling constituted rever-

sible error. Petitioner asserts that the specific prior misconduct at issue was indicative of the witness's moral turpitude and, therefore, probative of his disregard for truth and honesty. Since the informant's testimony was the cornerstone of the government's case, this abridgment of defense counsel's cross-examination deprived petitioner of a fair trial.

Consideration of this Court, it is respectfully submitted, is required to preserve the fundamental right of confrontation embodied in the Sixth Amendment.

CONCLUSION

For all of the reasons set forth above, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

RONALD P. FISCHETTI
Counsel for Petitioner
CHARLES DAVI

ANNE C. FEIGUS
Of Counsel

May 4th, 1981

APPENDIX "A"

ORDER DATED MARCH 5th, 1981

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, in the United States Court House, in the City of New York, on the 5th day of March, one thousand nine hundred and eighty-one.

HON. WILFRED FEINBERG
Chief Judge
HON. JAMES L. OAKES
Circuit Judge
HON. CONSTANCE BAKER MOTLEY*
District Judge

UNITED STATES OF AMERICA,

Appellee,

v.

CHARLES DAVI,

Appellant.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the judgment

of said District Court be and it hereby is AFFIRMED.

Charles Davi appeals from a judgment of conviction entered on October 17, 1980, after a jury trial in the United States District Court for the Eastern District of New York, Edward R. Neaher, J. Davi was convicted on two counts of knowingly and intentionally distributing heroin, a controlled substance, in violation of 21 U.S.C. §841(a)(1); he was sentenced to concurrent seven-year prison terms on each count, fined $5,000, and placed on special parole for five years.

The principal evidence against Davi at his trial was supplied by Thomas Bernidakis, a Government informant with a substantial criminal record. Bernidakis testified that he had met with Davi and negotiated the purchase of five ounces of heroin, which purchase was consummated on two occasions in February and March 1979. Bernidakis also testified that he had worn a concealed tape recorder during some of these negotiations, and recordings assertedly made on these occasions were presented as a part of the Government case. On cross-examination, Davi's attorney explored Bernidakis' criminal record, and attempted to impeach his truthfulness. Davi later testified in his own defense, denied having sold Bernidakis any heroin, and stated that the voice purported to be his on the incriminator tape recordings was not in fact his. Davi's defense theory, in essence, was that he was falsely accused by Bernidakis, whose motive was to perpetuate his lucrative and protected position as a Government informant.

Davi argues to us that the district judge improperly restricted cross-examination of Bernidakis when Davi's attorney sought to inquire into the circumstances underlying one of the crimes for which Bernidakis was arrested and also into Bernidakis' role as a Government informant in another drug prosecution. These complaints are without merit. It is well established that a district judge has discre-

tion to control cross-examination designed to impeach the credibility of a witness, and that the exercise of that discretion will not be disturbed in the absence of a clear showing of abuse. There was no such abuse here. Cf. United States v. Miles, 480 F.2d 1215, 1217 (2d Cir. 1973).

Davi also argues that the district judge erred in allowing into evidence the tape recordings offered by the Government to corroborate Bernidakis' testimony. Davi contends that those recordings were so unintelligible with respect to Davi's part of the conversations that the recordings as a whole should have been excluded. This argument is without substance. Davi does not challenge the accuracy of the transcript of the recordings prepared by the Government and presented to the jury along with the recordings themselves. As the transcript shows, enough of the conversations was intelligible to render the recordings as a whole admissible. Under the standard enunciated by this Court in United States v. Bryant, 480 F.2d 785, 790 (2d Cir. 1973), there was no error in admitting the recordings.

The judgment of conviction is affirmed.

s/Wilfred Feinberg
WILFRED FEINBERG,
Chief Judge

s/James L. Oakes
JAMES L. OAKES
Circuit Judge

s/Constance Baker Motley
CONSTANCE BAKER MOTLEY
District Judge